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Organised crime and corruption in the UK: responding through law

At one time “corruption by organised crime”¹ was not regarded as a major issue in the UK. Now, however, it has growing salience in political discourse and policy formulation.² It is recognised increasingly as an internal, albeit still uncommon, problem, as opposed to something that occurred overseas,³ or sporadically in relation to particular actors or sectors.⁴ Similarly, in the academic context, until recently⁵ exploration of the nexus between organised crime and corruption in Europe has been limited to certain jurisdictions,⁶ or certain types of crimes.⁷ And while discrete responses to both phenomena have been analysed from various disciplinary standpoints, less consideration has been given to the interface between the two and the extent to which the law is useful in addressing corruption by organised crime. This paper maps the available legal responses across the UK in an effort to determine the law’s coverage in preventing and reacting to “corruption by organised crime”.

The paper has three sections, focusing on the form of the problem, key definitions, and the law. First, I consider the forms that corruption by organised crime may take. Second, I explore the concepts of “organised crime” and “corruption”. Thirdly, and more specifically, I outline and assess the relevant legal measures, from substantive criminal offences to preventive regulations. In particular, I identify some points of contrast in Scotland when compared to the rest of the UK.

1. The nature and scale of the problem

* Thanks to Louise Brangan for research assistance, and to Chloë Kennedy for useful feedback. All errors are my own.

¹ Home Office, *Serious and Organised Crime Strategy* (London: Stationery Office, 2013) 6.40.

² *ibid*; Serious Organised Crime Taskforce, *Letting Our Communities Flourish – A Strategy for tackling Serious Organised Crime in Scotland* (Edinburgh: The Scottish Government, 2009) paras 47 and 48; Organised Crime Taskforce, *2012 Annual Report & Threat Assessment, Organised Crime in Northern Ireland* (2012) 28.

³ The Scottish Parliament, *Brussels Bulletin*, Issue 86, April 2013, available at [http://www.scottish.parliament.uk/S4_EuropeanandExternalRelationsCommittee/Brussels%20Bulletin/Issue_86_April_2013_\(pdf_295_KB\).pdf](http://www.scottish.parliament.uk/S4_EuropeanandExternalRelationsCommittee/Brussels%20Bulletin/Issue_86_April_2013_(pdf_295_KB).pdf) 9; National Crime Agency, *National Strategic Assessment of Serious and Organised Crime* (London: National Crime Agency, 2014) 4.

⁴ See J Miller, *Police Corruption in England and Wales: An assessment of current evidence* Home Office Online Report 11/03 (London: Home Office, 2003).

⁵ See P Gounev and V Ruggiero (eds) *Corruption and Organized Crime in Europe. Illegal partnerships* (Oxford: Routledge, 2012).

⁶ M Levi, “States, frauds, and the threat of transnational organized crime” (2012) 66 *Journal of International Affairs* 37-48; D Middleton and M Levi “Let sleeping lawyers lie: organized crime, lawyers and the regulation of legal services” (2015) *British Journal of Criminology* advance access; PC van Duyne and T Vander Beken “The incantations of the EU organised crime policy making” (2009) 51 *Crime, Law and Social Change* 261-281.

⁷ See J Spencer, K Aromaa, M Junninen, A Markina, J Saar and T Viljanen, *Organised crime, corruption and the movement of people across borders in the new enlarged EU: A case study of Estonia, Finland and the UK* (Helsinki: United Nations, 2006).

Generally (though one may contest the methodological approaches), the UK is regarded as experiencing low levels of corruption.⁸ Of course, a lack of evidence of corruption, and thus the relatively positive public perception, may be explained by factors such as under-reporting, a prevalence of low-level corruption that is not investigated, and poor scrutiny mechanisms.⁹ As Xenakis remarked in 2007, very little polling has been carried out in the UK on corruption; there are few court trials for corruption, and there is little public debate or discourse on corruption.¹⁰ The nature and the extent of discussion on corruption appear to be changing, but otherwise Xenakis' observations hold true, especially in relation to corruption by organised crime.

Practically speaking, corruption could aid the commission of organised crime in a variety of ways. One can envisage an organised crime group developing corrupt relationships to ensure the flow of information and to protect against state intervention.¹¹ Moreover, corruption may guard against the group needing to resort to violence; and it ensures competitive advantage and thus facilitates the survival and growth of the criminal enterprise. Corruption could range from the corruption of personnel with access to data systems; officers involved in border control, policing, prisons and prosecution services; administrators of such institutions; managers in charge of procurement of goods and services; the judiciary, witnesses, and juries.

Beyond the general empirical work on corruption, it is difficult to ascertain the extent to which organised crime groups (OCGs) are involved in corruptive behaviour in the UK. Though the NCA states that "the impact of corruption is disproportionate to the level and frequency at which it occurs",¹² this claim is hard to dispute, given the uncertainty of these terms, and the difficulty in quantifying the nature and degree of corruption. Nonetheless, it seems that organised crime does not exert a systematic influence over the UK's legitimate economy and political system.¹³ There is no indication of organised criminals influencing elections, or of political alliances protecting such actors. Having said this, police corruption is not unheard of across the UK,¹⁴ and there is evidence of corruption of prison officers.¹⁵ Moreover, it appears that some criminal groups have corrupted local business

⁸ See Brussels, 3.2.2014 COM(2014) 38 Final Report From The Commission to the Council and the European Parliament EU Anti-Corruption Report 6; (e.g. scoring 14th on Transparency International's Corruptions Perception Index in 2014: <http://www.transparency.org/cpi2014/results>).

⁹ Transparency International, *Corruption In UK Local Government: The Mounting Risks* (London: Transparency International, 2013); also Transparency International, *Assessment of Corruption in the UK* (London: Transparency International, 2011) 1.

¹⁰ S Xenakis, "The Dog(s) that Didn't Bark: Exploring Perceptions of Corruption in the UK", Discussion Paper 10, Crime and Culture Research Project (Konstanz: University of Konstanz, 2007).

¹¹ As is suggested by the Home Office, *Serious and Organised Crime Strategy* n 2, 6.34 – 6.35.

¹² NCA, n 3, 13.

¹³ L Paoli and C Fijnaut, "Organised Crime and Its Control Policies" (2006) 14 *European Journal of Crime, Criminal Law and Criminal Justice* 307, 312; P Gounev and T Bezlov, *Examining the Links Between Organised Crime and Corruption* (Brussels: Center for the Study of Democracy/European Commission, 2010) 73.

¹⁴ See the Independent Police Complaints Commission, *Corruption in the police service in England and Wales: Second report – a report based on the IPCC's experience from 2008 to 2011* (London: The Stationery Office 2012).

¹⁵ V Ruggiero and P Gounev *Corruption and the disappearance of the victim* in Gounev and Ruggiero, n 5, 27.

structures.¹⁶ However, it is claimed that corruption of the judiciary is very rare, though corruption of prosecution administration and the jury has occurred.¹⁷

Official data do not indicate to what extent corruption is linked to organised crime. Looking to official statistics on recorded crime or prosecution for bribery, breaches of data protection, or to figures on public procurement, will not reveal the perpetrators or the purpose of the corruptive behaviour, which is critical in this context. In addition, no figures are retained centrally in the UK regarding public sector employees who were fired, suspended or prosecuted because of corruption or breach of data protection law regarding the access of information.¹⁸ Similarly, neither the Cabinet Office nor the Crown Commercial Service hold data regarding how many and which firms have been refused public contracts under procurement rules because of convictions for bribery and related matters, on the ground that it is a matter for individual contracting authorities to determine whether or not to exclude bidders on the grounds that they have been convicted of certain criminal offences including conspiracy, corruption, bribery and fraud.¹⁹

Despite the empirical uncertainty, the interaction between organised crime and corruption is noted increasingly in UK policy. The Home Office describes corruption as a “widely used tactic” of organised crime,²⁰ and as an important means of avoiding detection.²¹ Likewise, the National Crime Agency identifies corruption as a critical enabler of serious and organised crime,²² and the UK Anti-Corruption Plan refers to the threat of organised crime.²³ In contrast, the Northern Ireland Organised Crime Task Force does not refer to corruption in its annual reports, though the predominant issue in the province is the interplay between organised crime and paramilitary groups.²⁴

Indeed, the nexus between organised crime and corruption is recognised at the global level, with Gregory describing it as a “major preoccupation” of the EU and the UN.²⁵ For example, the United Nations Convention against Transnational Organised Crime calls for the criminalisation of corruption and the adoption of measures to address it. Moreover, the Preamble to the UN Convention against Corruption (UNCAC) notes the concern of states parties “about the links between corruption and other forms of crime, in particular organised crime and economic crime, including money-laundering”. The correlation between corruption and money laundering is reiterated in documents and measures from European Union

¹⁶ Europol, *OCTA 2009: EU Organised Crime Threat Assessment* (Netherlands: European Police Office, 2009) para 5.6.

¹⁷ Gounev and Bezlov n 13, 51.

¹⁸ 548-14 FOI 91859 from Ministry of Justice, 28 July, 2014; Cabinet Office FOI Reference:FOI319913 12 August, 2014.

¹⁹ FOI Reference: FOI319913 12 August, 2014.

²⁰ Home Office, *Local to Global: Reducing the Risk from Organised Crime* (London: Stationery Office, 2011) 6.

²¹ Ibid 11 and 21.

²² National Crime Agency, n 3, 13.

²³ HM Government, *UK Anti-Corruption Plan* (London: Stationery Office, 2014) para 2.1.

²⁴ See eg Organised Crime Task Force, *Annual Report & Threat Assessment 2015* (Northern Ireland Office 2015) 15.

²⁵ F Gregory “Classify, report and measures: the UK Organised Crime Notification Scheme” in A Edwards and P Gill (eds) *Transnational Organised Crime: Perspectives on Global Security* (Oxford: Routledge, 2006) 91.

institutions.²⁶ The European Commission in its *Communication on Fighting Corruption in the EU* stated that corruption “causes social harm as organised crime groups use corruption to commit other serious crimes, such as trafficking in drugs and human beings.”²⁷ And beyond the official governmental context, Transparency International regards corruption as organised crime’s “most powerful tool”.²⁸

2. Defining the issues

Both “organised crime” and “corruption” are difficult to identify and define, and this complexity is compounded by their conjunction. There is no legislative definition of “corruption by organised crime” anywhere in the UK, and the only policy effort states: “in a serious and organised crime context corruption is defined as ‘the ability of an individual or group to pervert a process or function of an organisation to achieve a criminal goal’”.²⁹ Thus it is useful to unpack the meaning of these constituent parts before considering the legal measures that can address the phenomenon.

a. Corruption

Corruption generally is understood as the abuse of public power for private profit or for a gain in power or status,³⁰ though it is also less frequently regarded as the abuse of private power.³¹ Various models of corruption have been put forward.³² The orthodox view is that corruption compromises a duty and thereby offends against the relationship and loyalty between a principal and agent.³³ This approach has been challenged by scholars such as Alldridge, reframing the issue as an offence against the market.³⁴ The harm lies in the distortion of a market, not the corruption of a relationship.

Numerous forms of corruption exist, including: bribery of public officials, abuse of functions and power, and the use of office for personal gain.³⁵ And like any

²⁶ See *Council Resolution of 21 December 1998 on the prevention of organised crime with reference to the establishment of a comprehensive strategy for combating it* (Official Journal C 408 of 29.12.1998); Communication from the Commission to the Council and the European Parliament, “Developing a strategic concept on tackling organised crime” (COM/2005/0232 final).

²⁷ Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, *Fighting Corruption in the EU* (COM (2011) 308 final) 3.

²⁸ Transparency International *Corruption In The UK: Part One – National Opinion Survey* (London: Transparency International, 2013) 14.

²⁹ National Crime Agency, *National Strategic Assessment of Serious and Organised Crime 2015* (London: National Crime Agency, 2015) [117].

³⁰ JS Nye “Corruption and political development” (1967) 61 *American Political Science Review* 417-427; S Rose-Ackerman, *Corruption. A Study in Political Economy* (London: Academic Press, 1978).

³¹ Though it may be argued that there is a qualitative difference between the corruption of those in the public sector and those in the private sector, with the latter representing more “collusion” (Gounev and Bezlov n 13, 17), this paper looks at both types. Indeed, Article 21 of UNCAC mentions bribery in the private sector.

³² Law Commission, *Reforming Bribery A Consultation Paper* (Consultation Paper No 185) (London: Law Commission, 2007) 27.

³³ Nye, n 30, 419.

³⁴ P Alldridge “Reforming the Criminal Law of Corruption” (2001) 11 *Criminal Law Forum* 287, 288-289.

³⁵ See M Beare “Corruption and Organized Crime: Lessons from History” (1997) 28 *Crime, Law and Social Change* 161-162.

crime, corruption varies in terms of gravity, sophistication, impact and reach.³⁶ Moreover, conceptions of what is corrupt are temporally, culturally and jurisdictionally contingent.

No statutory definition of corruption exists in the UK. Despite its significance in the Public Bodies Corrupt Practices Act 1889 and the Prevention of Corruption Acts 1906 and 1916, the term was not defined there. And as is elaborated upon below, the Bribery Act 2010 repealed and replaced these Acts but corruption remains undefined. The House of Lords described “corruptly” in the context of the Corrupt Practices Prevention Act 1854 as meaning “not ‘dishonestly,’ but in purposely doing an act which the law forbids as tending to corrupt”.³⁷ That definition was adopted and followed by the Court of Criminal Appeal in *R v Smith* in relation to the Public Bodies Corrupt Practices Act 1889.³⁸

This paper’s understanding of corruption encompasses the abuse of power, be that public or private, for personal gain. Corruption here is both active and passive, in that it applies to the corruptor and the corrupted. Though this maps onto policy understandings, some may argue that an expansive approach dilutes the concept. I suggest that focussing on the abuse, rather than the source, of power, is correct.

b. Organised crime

Despite its prominence in political discourse, the term “organised crime” has no “agreed-upon definition”.³⁹ Its meaning differs, between and within the academic, legal or political spheres. It may describe specific structures or organisations that are involved in criminality; the provision of illegal goods or services; or a certain type of crime that meets a given level of gravity.⁴⁰

As yet, there is no statutory definition of organised crime anywhere in the UK. The Serious Crime Act 2015 criminalises participation in activities of an organised crime group, but the offence (which applies in England and Wales) centres on the notion of such a group, rather than organised crime itself.⁴¹ Section 45 provides that an OCG has as its/a purpose the carrying on of criminal activities, and comprises at least three persons acting together or agreeing to do so to further that purpose. “Criminal activities” are offences punishable with imprisonment for at least seven years, carried on in England or Wales, with a view to obtaining any gain or benefit. Strictly speaking, organised crime is not defined in Scotland – rather “serious organised crime” is. This is crime involving two or more persons acting together for the principal purpose of committing or conspiring to commit a serious offence or a series of such, where “serious offence” means an indictable offence committed with the intention of obtaining a material benefit, or an act or threat of violence made

³⁶ AJ Heidenheimer, *Political corruption: readings in comparative analysis* (New York: Holt Rinehart and Winston, 1970).

³⁷ *Cooper v Slade* (1858) 6 HL Cas. 746, 773.

³⁸ [1960] 2 QB 423, 429.

³⁹ P Van Duyne, “The Phantom and Threat of Organized Crime” (1996) 24 *Crime, Law And Social Change* 341, 343.

⁴⁰ See Paoli and Fijnaut, n 13, 308; N Hamilton-Smith and S Mackenzie, “The geometry of shadows: a critical review of organised crime risk assessments” (2010) 20 *Policing and Society* 257, 261.

⁴¹ See P Jarvis and R Earis “Participating in the activities of an organised crime group: the new offence” (2015) *Crim LR* 766.

with the intention of obtaining such benefit.⁴² There is no equivalent legislation in Northern Ireland.

Views differ as to the nexus between corruption and organised crime. Some see corruption as being a constituent part of organised crime; others regard it as practically useful. Some definitions of organised crime, such as that proposed by Maltz, refer explicitly to corruption;⁴³ for others, organised crime's continued existence is based on corruption of state personnel,⁴⁴ and the sophistication of organised crime may be predicated on effective corruption. As Levi notes, highly organised crime is less likely to flourish in the absence of corrupt alliances between criminal justice officials, politicians and suppliers of illegal commodities,⁴⁵ and it has been argued that the most successful criminal organisations make strategic use of violence and systematic use of corruption to weaken official oversight and law enforcement.⁴⁶ Nonetheless, Van Duyne argues that organised crime-entrepreneurs engage in corrupt relations only if the risks (such as the sharing of information) are offset by expected advantages.⁴⁷ So, although the two concepts and forms of crime are linked,⁴⁸ there is scholarly divergence as to whether corruption is a necessary definitional aspect of organised crime, or, as is more likely, a valuable facilitating factor.

Finally, it is worth noting that the organised crime provisions in the Serious Crime Act 2015 or the Criminal Justice and Licensing (Scotland) Act 2010 do not mention corruption. Indeed, were legislative definitions of organised crime to refer to corruption this would make proving the offence more complex.

3. Responding through law

Now I turn to map the range of legal responses available in the UK, and to ascertain the value in the law preventing and reacting to corruption by organised crime.

As Zimring and Johnson note, corruption differs from other crimes in terms of its social structure and distribution in society, given that it generally involves the act of someone with the means to bribe another or the power to provide a favour in

⁴² Criminal Justice and Licensing (Scotland) Act 2010, s 28(3).

⁴³ For Maltz, organised crime includes violence, corruption, continuity, and variety in the types of criminality engaged in: M Maltz, "On Defining 'Organized Crime': The Development of a Definition and a Typology" (1976) 22 *Crime and Delinquency* 338.

⁴⁴ J Albanese "The Causes of Organized Crime: Do Criminals Organize Around Opportunities for Crime or Do Criminal Opportunities Create New Offenders?" (2000) 16 *Journal of Contemporary Criminal Justice* 409, 411.

⁴⁵ M Levi, "Policing fraud and organised crime" in T Newburn (ed) *Handbook of Policing* (2nd ed) (Cullompton: Willan, 2008) 522.

⁴⁶ International Narcotics Control Board, *Annual Report*, "Chapter One – Drugs and Corruption" (New York: United Nations, 2010) 3.

⁴⁷ P Van Duyne "Organized crime, corruption and power" (1996) 26 *Crime, Law and Social Change* 201, 205.

⁴⁸ RT Naylor "Predators, parasites, of free-market pioneers: reflections on the nature and analysis of profit-driven crime" in M Beare (ed) *Critical reflections on transnational organized crime, money laundering, and corruption* (Toronto: University of Toronto Press, 2003) 35; L Shelley "The unholy trinity: transnational crime, corruption, and terrorism" (2005) 11 *Brown J World Aff* 101-111.

return for a bribe.⁴⁹ So corruption is hard to detect and prosecute due to the often high status of the offenders, the frequent lack of a direct victim, and the cooperative nature of the behaviour.⁵⁰ In the specific context of corruption by organised crime, these issues are compounded as the power dynamic may be predicated on the threat of violence, and due to the group involvement. This may render many legal responses unworkable. Indeed, scepticism has been expressed about the ability of the law to address the issue adequately. It has been argued that law may exacerbate the problem, such as where too much regulation and excessive formalism generates corruption by encouraging people to circumvent the law.⁵¹ Nonetheless, I suggest this does not undermine the value of the law in all instances, but draws attention to potential unintended consequences.

Needless to say the creation and application of criminal law offences is just one aspect in deterring and reducing corruption: structural and cultural reforms and capacity building through education and public awareness campaigns are of significant value. Williams-Elegbe classifies possible reactions as administrative (involving executive discretion), regulatory (including criminal and civil laws) and social (stigma).⁵² My focus is on what Williams-Elegbe would class as regulatory, with the paper assessing the existing suite of legal mechanisms that address corruption by organised crime. Though this is not an exhaustive list, it provides an analysis of potentially relevant substantive offences and preventative measures. In a reactive sense, both the civil and criminal law may be relied upon. Licensing laws and procurement standards ostensibly seem the predominant preventive measures, though the criminal law may also act *in terrorem*, through measures which need never be invoked in practice. Overall the law is of use in both a substantive and symbolic sense, though key doctrinal gaps exist in the Scottish context.

a. The criminal law

A range of criminal law measures addresses corruption by OCGs, involving the abuse of office and illegitimate access to information, for instance.

i. Inappropriate accessing of information

Sensitive and protected information may be useful for an OCG, as it may include details of an intended victim, a witness or about an investigation, or it may be sold on for profit. Given the difficulty of surmounting sophisticated security systems, the corruption of “insiders” may be more straightforward and less resource-intensive for OCGs.⁵³ This renders many people and positions in both the public and private sector vulnerable to advances from OCGs, ranging from clerks in the prosecution service, through police officers with access to secure databases, and operators in call centres.

⁴⁹ F Zimring and D Johnson, “On the Comparative Study of Corruption” (2005) 45 *British Journal of Criminology* 793-809, 796.

⁵⁰ Zimring and Johnson, 799.

⁵¹ D Nelken and M Levi, “The Corruption of Politics and the Politics of Corruption: An Overview” (1996) 23 *Journal of Law and Society* 1-17, 9.

⁵² S Williams-Elegbe, *Fighting Corruption in Public Procurement: A Comparative Analysis of Disqualification or Debarment Measures* (Oxford: Hart, 2012) 2.3.1.

⁵³ R Smith and P Jorna “Corrupt misuse of information and communications technologies” in A Graycar and R Smith (eds) *Handbook of Global Research and Practice in Corruption* (Cheltenham: Elgar, 2011) 255-281, 265.

Unauthorised access to or use of information systems constitutes a breach of s 55 of the Data Protection Act 1998, which criminalises the knowing or reckless obtaining or disclosure or sale of personal data, and applies across the UK. Though such corrupt behaviour may be of considerable benefit to an OCG, conviction under s 55 attracts a fine only, albeit an unlimited one. One implication of the absence of a custodial sentence is that breaches of s 55 are not recordable offences, and so no criminal record accrues. This makes the tracking of consecutive acts more difficult.

Numerous calls have been made for custodial sentences to be imposed in respect of the breach of s 55;⁵⁴ this has not occurred, despite s 77 of the Criminal Justice and Immigration Act 2008 authorising the Secretary of State to alter this penalty. The rationale is that other cognate offences exist,⁵⁵ such as unauthorised access to computer material and unauthorised access with intent to commit or facilitate commission of further offences under the Computer Misuse Act 1990, and, as are explored below, misconduct in public office and bribery.

In addition, s 1(3) of the Official Secrets Act 1989 is relevant in respect of the corruption of public sector employees, making it an offence for a person who is or has been a Crown servant or government contractor to make, without lawful authority, a damaging disclosure of any information or document relating to security or intelligence which he possessed due to his position. Furthermore, s 4 states that a person who is or has been a Crown servant or government contractor is guilty of an offence if without lawful authority he discloses any information or document which is or has been in his possession by virtue of his position where the disclosure results or is likely to result in the commission of an offence; or facilitates an escape from legal custody impedes the prevention or detection of offences or the apprehension or prosecution of suspected offenders.

These provisions are used in response to corruption by organised crime, as well as more broadly. For instance, in 2014 an employee of the Crown Office and Procurator Fiscal Service was found guilty of breaching the Official Secrets Act 1989 and the Data Protection Act 1998 by revealing to an accused person information on a number of court cases, including the details of witnesses.⁵⁶

ii. Misconduct in public office

Corruption of a public servant by an OCG may result in her prosecution for misconduct in public office (MIPO) in England, Wales and Northern Ireland. This is a common law offence, the gravity of which is exemplified by the fact that it is triable on indictment only and carries a maximum sentence of life imprisonment.

According to the *Attorney General's Reference No 3 of 2003*, this offence is committed when a public officer, acting as such, wilfully neglects to perform his duty and/or wilfully misconducts himself to such a degree as to amount to an abuse of

⁵⁴ Home Affairs Committee, *Private Investigators, Fourth Report of Session 2012-13* (HC 100) (London: The Stationery Office 2012) para 47; Joint Committee on the Draft Communications Data Bill, *First Report of Session 2012-13, Draft Communications Data Bill* (HL Paper 79, HC 479) (London: The Stationery Office 2012) para 226.

⁵⁵ The Justice Committee provides a useful outline of the Government's opinion: House of Commons Justice Committee, *The functions, powers and resources of the Information Commissioner* Ninth Report of Session 2012-13 (London: The Stationery Office 2012) para 43.

⁵⁶ See BBC News, "Crown Office employee Iain Sawers guilty of leaks", 5 September, 2014; available at <http://www.bbc.co.uk/news/uk-scotland-edinburgh-east-fife-29082364>

the public's trust in him, without reasonable excuse or justification.⁵⁷ This definition was described as "an improvement on the uncertainty that preceded it, but ... still distinctly vague".⁵⁸ Furthermore, this is a conduct rather than a result crime, though it has been suggested that certain decisions of the CPS not to prosecute due to an absence of material damage imply that prosecution policy has imported this requirement.⁵⁹

Needless to say, MIPO is an offence confined to those who are public office holders, viz. "an officer who discharges any duty in the discharge of which the public are interested, more clearly so if he is paid out of a fund provided by the public".⁶⁰ This implies that the offence may not cover employees in private employment who carry out public functions. To be sure, the offence's reach is becoming more significant in an era when more and more public functions are divested to private companies, such as prison security and transport to court. Indeed, the Court in *Attorney General's Reference No 3 of 2004* noted that "This potential unfairness [as to who falls within its scope] adds weight, in our view, to the conclusion that the offence should be strictly confined but we do not propose to develop the point or to consider further the question of what, for present purposes, constitutes a public office."⁶¹

Misconduct in public office has been relied on against allegedly corrupt police officers and prosecutors that seek to benefit criminal associates. For instance, a number of years ago a CPS lawyer pleaded guilty to such a charge, *inter alia*, after having accepted a substantial payment to drop a case.⁶² In *Attorney General's Reference No 30 of 2010* the Court of Appeal increased to six years (from three) the period of imprisonment for a serving police officer who provided intelligence about on-going police operations to a drug dealer with connection to various OCGs over a five year period.⁶³

In contrast, there is no equivalent crime in Scotland. Gordon notes that it is a crime at common law for a public official, a person entrusted with an official situation of trust, wilfully to neglect his duty, even where no question of danger to the public or to any person is involved.⁶⁴ Nonetheless, he stresses that common law prosecution against officials for breach of duty are almost unknown. One instance of this was *Wilson v Smith* where a police sergeant was charged with wilful neglect of her duty by failing to submit to the procurator fiscal reports relating to alleged offenders.⁶⁵ The last reported case of breach of duty by a non-judicial official appears to be in the 19th century.⁶⁶ The absence of a MIPO offence in Scotland is

⁵⁷ *Attorney General's Reference No 3 of 2003* [2004] EWCA Crim 868.

⁵⁸ JR Spencer, "Policemen behaving badly – The abuse of Misconduct in Office" [2010] 69 Camb LJ 423, 425.

⁵⁹ S Parsons, "Misconduct in a public office - should it still be prosecuted?" (2012) *Journal of Criminal Law* 179, 181-2.

⁶⁰ *R v Whitaker* (1914) KB 1283, 1298.

⁶¹ *Attorney General's Reference (No 3 of 2003)* [2004] EWCA Crim 868 [62].

⁶² CPS News, "CPS lawyer admits serious offences in breach of trust", 14 July, 2010 available at http://www.cps.gov.uk/news/latest_news/126_10/

⁶³ [2010] EWCA Crim 2261.

⁶⁴ G Gordon, *Criminal Law* (3rd ed) Vol. II [44.01], referring to Hume I 411.

⁶⁵ 1997 SLT 91.

⁶⁶ See Gordon n 64 [44.01] referring to Thos Black Webster 1872 2 Couper 339.

notable in this context. Nonetheless, calls have been made for MIPO's reform,⁶⁷ and the Law Commission is beginning consultative work.⁶⁸ So while the enactment of a comparable measure in Scotland would go some way to ensuring that corrupt acts do not fall between existing criminal provisions, concerns about the precise scope of the existing offence give us pause for thought.

MIPO is supplemented by the newly enacted s 26 of the Criminal Justice and Courts Act 2015 which makes it an offence for a police constable in England and Wales to exercise the powers and privileges of a constable improperly, where s/he knows or ought to know that the exercise is improper. This includes officers of the National Crime Agency who have the powers and privileges of a constable, including those operating in Scotland but not Northern Ireland. Improper exercise means exercising the powers for the purpose of benefiting herself, or for the benefit or a detriment for another person, and a reasonable person would not expect the power or privilege to be exercised for the purpose of achieving that benefit or detriment. This provision includes the failure to exercise a power and threatening to exercise or not falls. The rationale for this new provision was to supplement the "outdated common-law offence of misconduct in public office".⁶⁹

Overall these offences may deter the potentially corrupted official, and provide a means of responding to corruption once it occurs. The corruptor, who in this context is acting for or as part of an OCG, may be guilty of aiding and abetting or conspiring to commit such offences.

iii. Bribery

A further critical piece of domestic legislation is the Bribery Act 2010, though of course this pertains to particular forms of corruption only. The concern in this paper is not just the corruption of state officials by OCGs, but also of private bodies, against which the Bribery Act is directed. The 2010 Act, which applies across the UK, provides for the offences of bribing another person⁷⁰ (active bribery), being bribed⁷¹ (passive bribery), and bribing foreign public officials.⁷² Bribing involves offering, promising or giving a financial or other advantage to another person, where the briber intends this to induce a person to perform improperly a relevant function or activity, or to reward a person for such improper performance, or where the briber knows or believes that the acceptance of the advantage would itself constitute such improper performance.⁷³ The Act also introduced the offence of failure of commercial organisations to prevent bribery of someone on her behalf.⁷⁴ An organisation will have a defence if it can prove it has adequate procedures in place to prevent persons associated with it from bribing.

The Act applies to such actions in the UK and abroad, in the public and

Comment [A1]: By the time this is in print this will need to be updated – the Law comm paper publishes in October. Ed

Comment [A2]: Am I correct in thinking this has not yet happened?

⁶⁷ A Ashworth "Misconduct in public office – ingredients of offence: misuse of public funds" (2010) Crim LR 779, 780.

⁶⁸ Law Commission, "Misconduct in Public Office", available at <http://www.lawcom.gov.uk/project/misconduct-in-public-office/> (accessed 15/7/15).

⁶⁹ Hansard, 6 March 2014, Column 1065, Home Secretary.

⁷⁰ s 1.

⁷¹ s 2.

⁷² s 6.

⁷³ s 1.

⁷⁴ s 7.

private sectors. The replacement statutory offences do not differ greatly from their predecessors,⁷⁵ except for extension of the offences to the private sector, a development that is questioned by Horder and Alldridge for overlooking the distinct moral significance in public sector wrongdoing.⁷⁶ In response I argue that the abuse of private power for private gain warrants inclusion in understanding of and legislation on bribery. Though the Act covers all forms of bribery, there is a clear focus on commercial bribery, as noted in the Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions.⁷⁷

The 2010 Act is perceived as being very strict, and as applicable in relation to a narrow range of corrupt practices only. Nonetheless, its presence may act as a deterrent “*in terrorem*” measure that need never be invoked in practice. Moreover, much of the controversy concerning the application of the Act is bypassed by the nature and illegitimacy of OCGs. For instance, the DPP in England and Wales or the Director of the SFO may enter into a deferred prosecution agreement with an organisation facing prosecution for an economic or financial offence including fraud and bribery,⁷⁸ and as long as the terms are adhered to the prosecution is deferred. In Scotland, there is a “self-reporting” scheme permitting the reporting by organisations of conduct that may amount to an offence under the Bribery Act 2010.⁷⁹ These mechanisms are not uncontroversial, given the circumvention of prosecution.⁸⁰ Nonetheless, they are not of relevance here; such agreements could not relate to an OCG, as such agreements would legitimate the entity and its existence. Moreover, though some OCGs are hierarchical with a relatively stable structure and board, most are not.

b. Preventive measures

In addition to targeting individual officials or power holders, OCGs may seek to “corrupt” processes of procurement and licensing, both to legitimise their enterprise and to generate profit. The sectors most susceptible include the public works and construction sector, property, legal and business services, and extractive industries.⁸¹ I next turn to consider preventive measures against potential corruption in public contracts and licensed businesses.

i. Public procurement

Public procurement, namely the state’s buying of goods and services from external suppliers, holds the potential to be corrupted, given the combination of high expenditure and the significant discretion of public officials. Furthermore, the complex nature of the public works and construction sector make it difficult to

⁷⁵ This Act repealed the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Acts 1906 and 1916.

⁷⁶ J Horder and P Alldridge (eds), *Modern Bribery Law Comparative Perspectives* (Cambridge: CUP, 2013) 3.

⁷⁷ CPS Guidance: http://www.cps.gov.uk/legal/a_to_c/bribery_act_2010/index.html

⁷⁸ Crime and Courts Act 2013, schedule 17.

⁷⁹ This expired in 30 June 2015.

⁸⁰ See M Bisgrove and M Weekes “Deferred prosecution agreements: a practical consideration” (2014) *Criminal Law Review* 416.

⁸¹ See V Leacock *Public Procurement Reform – a rapid evidence review* (Edinburgh: Scottish Government, 2013) para 6.31.

monitor. Corruption schemes in public procurement range from bribes or “kickbacks” where the influencing public official gets a cut of the awarded contract; bid rigging (where the outcome of the tender is manipulated); the use of “front” or “shell” companies; to the misrepresentation of facts.⁸² A key concern is the granting of a contract to a company which is essentially an OCG, or which has connections to one.⁸³

Public procurement represents a large component of public expenditure in the EU,⁸⁴ and so various directives seek to ensure transparency and non-discrimination in the regulation of the single market. These directives, and their implementing regulations, are silent as regards potential criminal involvement in the process. Overall, though tangentially, such measures serve to prevent corruption in public contracts. Article 45 of Directive 2004/18/EC required the exclusion from participation in a public contract of any candidate or tenderer who has been the subject of a conviction by final judgment for participation in a criminal organisation, corruption, fraud relating to the protection of the financial interests of the European Communities, and money laundering.⁸⁵ This definition is not unproblematic, given the jurisdictionally specific meaning of “final judgment”,⁸⁶ and crucially, the obligations apply to contracts in excess of certain thresholds only. In addition, suspicion is not sufficient; rather there needs to be a conviction,⁸⁷ and there is some debate as to whether convictions from beyond the EU are included.⁸⁸ An equivalent scheme was established by Directive 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors. These were implemented in domestic law in 2006.⁸⁹

Most recently, Directive 2014/24/EU repealed Directive 2004/18/EC to provide a simplified procurement regime. This was implemented in UK by the Public Contract Regulations 2015. Article 57 of the new Directive expands the list of qualifying offences to include people trafficking and terrorist financing. Crucially, there is no longer a total bar after conviction, rather the maximum period of exclusion is five years.⁹⁰ Moreover, a means of “self-cleaning” is permitted by an economic operator who would otherwise be excluded, if it can show that measures

⁸² GT Ware, S Moss, JE Campos and G Noone, “Corruption in public procurement: A perennial challenge” in J Campos and S Pradhan *The Many Faces of Corruption: Tracking Vulnerabilities at the Sector Level* (Washington: World Bank: 2006) 299 et seq.

⁸³ See National Fraud Authority, *Procurement Fraud in the Public Sector* (October 2011) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/118460/procurement-fraud-public-sector.pdf [5.20]; <http://www.scotland.gov.uk/Topics/Justice/crimes/organised-crime/soc/PublicSectorProcurement>

⁸⁴ L Cernat and Z Kutlina-Dimitrova, “International Public Procurement: From Scant Facts To Hard Data” (2015) *Trade* issue 1 http://trade.ec.europa.eu/doclib/docs/2015/april/tradoc_153347.pdf

⁸⁵ See S Williams, “The Mandatory Exclusions for Corruption in the New EC Procurement Directives” (2006) *European Law Review* 71.

⁸⁶ Williams-Elegbe, n 52, 4.2.2.

⁸⁷ Leacock, n 81, para 5.88.

⁸⁸ N Dorn, M Levi and S White, “Do European procurement rules generate or prevent crime?” (2008) 15 *Journal of Financial Crime* 243.

⁸⁹ The Public Contracts Regulations 2006 and the Utilities Contracts Regulations 2006; and The Public Contracts (Scotland) Regulations 2006 and the Utilities Contracts (Scotland) Regulations 2006.

⁹⁰ Art 57.

taken in mitigation are sufficient to demonstrate its reliability. It remains to be seen how these changes play out in practice.

Disqualification from a public contract must be based on a conviction; in other words, tenders cannot be excluded if a prosecution is underway, or if other police data or intelligence exists.⁹¹ Williams-Elegbe identifies three rationales for the disqualification scheme: the policy rationale which demonstrates the government's lack of tolerance of the issue in addition to the furthering of tax policies; a punitive rationale which punishes the excluded individual; and a protective one, which seeks to maintain the process's integrity.⁹² All of these would validate extension to a non-conviction based exclusion. I suggest that this should not be mooted, given the stigma involved and the compromising of legitimate business. However, the limitation of the exclusion to a mere five years after conviction seems too lenient and thus is problematic in a pragmatic sense.

These efforts to ensure transparent and legitimate competition may inhibit the efforts of small enterprises, and may in fact damage competition. Moreover, there is no evidence of any operator being excluded from a public contract because of a relevant conviction. Indeed, the reliance on self-declaration in which only the winner of the contract needs to produce certificates to back up what was said in tender is in tension with rigorous exclusion of convicted criminals from public contracts. So, the extent to which procurement rules address adequately risks of fraud and corruption has been rightly questioned.⁹³

ii. Licensing

There is also considerable concern about the incursion of OCGs into legitimate business, through the provision of services like taxis and security, for example.⁹⁴ This may be regarded as corruption of both business and licensing processes and may take the form of misrepresentation in attaining a license, corruption of members of the relevant boards, and corrupt practices with or for otherwise "legitimate" entities. This leads to unfairness in awarding of contracts, undermines fair competition, and ensures benefit for criminal actors.

The privatisation of security has been explored elsewhere.⁹⁵ Suffice to say that one key issue in this respect is the incursion of dubious security actors, and the involvement of OCGs is particularly concerning, since it may facilitate further criminality like drug dealing or may be linked to extortion.⁹⁶ While this is a specific, enduring problem in Northern Ireland due to the links between certain private

⁹¹ Leacock, n 81, 55.

⁹² Williams-Elegbe, n 52, 33-4.

⁹³ Dorn, n 88.

⁹⁴ See Serious Organised Crime Task Force, 06/10/2014, <http://news.scotland.gov.uk/News/Serious-Organised-Crime-Task-Force-10e1.aspx> and House of Commons Northern Ireland Affairs Committee *Organised Crime in Northern Ireland Volume I* (Third Report of Session 2005–06) (London: The Stationery Office 2006) [196]–[203].

⁹⁵ See eg C O'Reilly *Policing Global Risks: The Transnational Security Consultancy Industry* (Oxford: Hart 2015).

⁹⁶ S Morris, *Clubs, Drugs and Doormen*, (Crime Detection and Prevention Series Paper 86) London: Home Office, 1998).

security providers and paramilitary groups,⁹⁷ it has also been flagged up in Scotland.⁹⁸

Efforts to address the corruption of security provision take the form of tightening of security licensing. Currently, the Security Industry Authority (SIA) operates a UK-wide scheme of compulsory licensing of individuals who undertake designated activities,⁹⁹ such as security guarding and door supervision, key holding and vehicle immobilising.¹⁰⁰ The licensing criteria are those the SIA considers appropriate for securing that the licensed persons are “fit and proper” to engage in such conduct,¹⁰¹ a concept to which I return later. In addition, the SIA operates a voluntary Approved Contractor Scheme (ACS) for private security suppliers.¹⁰² This is an accreditation scheme based on a set of operational and performance standards for suppliers. Notably, any contractor or sub-contractor performing security industry services under a Scottish Government contract or an NHS Scotland construction project is required to be registered with the ACS.¹⁰³

Last year it was suggested that the UK would move towards a mandatory scheme of licensing of business, not just individuals,¹⁰⁴ though this has yet to occur. Such a development has been described as “deregulatory” insofar as the objective would be to ensure reduction in cost and burden on the private security industry, a reduction in criminality and increased support for law enforcement partners, particularly those focused on disrupting serious and organised crime.¹⁰⁵ I suggest that public contracts for security provision should be awarded only to those businesses that have been accredited under the ACS. Though this would entail a degree of bureaucracy, the level and nature of the public expenditure should necessitate the high standards of the scheme. A further proposal considered by the Scottish Serious Organised Crime Taskforce in 2014 was the introduction of anti-mafia type certificates for businesses,¹⁰⁶ akin to those that are required in Italy.¹⁰⁷ This could take the form of a self-declaration of non-involvement in serious organised crime, as occurs in relation to NHS procurement.¹⁰⁸ Regardless, such certificates, with implications in terms of bureaucracy and rights of appeal, are not warranted in seeking to address this form of corruption by organised crime, and

⁹⁷ Independent Monitoring Commission *Fifth Report of the Independent Monitoring Commission* (London: The Stationery Office, 2005).

⁹⁸ <http://www.gov.scot/Topics/archive/law-order/organised-crime/soc/PublicSectorProcurement>

⁹⁹ Private Industry Act 2001, s 3.

¹⁰⁰ Schedule 2. The Private Security Industry Act 2001 (Designated Activities) Order 2006; The Private Security Industry Act 2001 (Designated Activities) (Scotland) Order 2007.

¹⁰¹ S 7.

¹⁰² See <http://www.sia.homeoffice.gov.uk/Pages/acs-intro.aspx>

¹⁰³ See <http://www.gov.scot/Topics/archive/law-order/organised-crime/soc/PublicSectorProcurement>

¹⁰⁴ <http://www.nsi.org.uk/wp-content/uploads/2013/10/sia-get-business-licensed.pdf> 6.

¹⁰⁵ *ibid.*

¹⁰⁶ See http://www.nhsscotlandprocurement.scot.nhs.uk/media/9651/day_1_presentations_-_part2.pdf

¹⁰⁷ A La Spina, “The Fight against the Italian Mafia” in L Paoli (ed) *The Oxford Handbook of Organized Crime* (Oxford: OUP, 2014) 593-611, 599.

¹⁰⁸ see

http://www.nhsscotlandprocurement.scot.nhs.uk/media/9715/soc_procurement_journey_notes_gb_-_version_8.pdf

indeed there is no equivalent development elsewhere in the UK.

Beyond the security context, licensing boards¹⁰⁹ are significant in addressing corruption by organised crime in respect of acquiring licenses for venues, taxis and so on. Currently, a licensing board may look at “relevant” and “foreign” convictions when considering an application for licensed premises:¹¹⁰ relevant offences are those involving violence or dishonesty, although notably bribery is not included.¹¹¹ A board can also consider whether granting the application would be consistent with the licensing objectives,¹¹² including the prevention of crime and disorder and securing of public safety.¹¹³

In this respect, the Air Weapons and Licensing (Scotland) Act 2015 permits licensing boards to consider more extensive range of information when making licensing decisions, on the basis that this would better address criminality. Section 43 of the Act reintroduced the “fit and proper” test for alcohol licensing, which once had been in place under the Licensing (Scotland) Act 1976 (s 17) but was moved away from in the Licensing (Scotland) Act 2005. Now a licensing board is able to consider information which “the chief constable considers may be relevant to consideration by the Board of the application”, and not just information deriving from criminal conviction. Moreover, s 52 removes the limitation which precludes a licensing boards from considering “spent” (under the Rehabilitation of Offenders Act 1974) relevant or foreign convictions when deciding on licence applications. This remains in place in England and Wales under s 114 of the Licensing Act 2003.

The rationale for the reintroduction of the fit and proper person test in Scotland is that it extends the material on which a licensing decision (most likely refusal) may be based. The concept is used in other contexts¹¹⁴ and so is not without precedent. Conversely, it could be argued that the vague nature of this criterion is problematic by involving unfettered discretion. Moreover, in terms of efficacy it has been suggested in the context of waste disposal in Northern Ireland that the fit and proper person test is not sufficiently robust to screen out criminals.¹¹⁵

4. Conclusion

The current political focus on “corruption by organised crime” prompts some concerns. While the dominant narrative may be one of a worsening situation, empirically this is difficult to test, due to the definitional complexities and the nature of the problem itself. Nonetheless, reflecting on the scope of existing law is a worthwhile exercise, given the gravity and potential impact of this phenomenon.

¹⁰⁹ Licensing boards comprise local authority councillors but are distinct legal entities from the councils themselves.

¹¹⁰ Licensing Act 2003, s 120; Licensing (Scotland) Act 2005, ss 24 and 42.

¹¹¹ Licensing Act 2003, Schedule 4; Licensing (Relevant Offences) (Scotland) Regulations 2007.

¹¹² Licensing Act 2003, s 4; Licensing (Scotland) Act 2005 s 84.

¹¹³ Licensing (Scotland) Act 2005 s 4.

¹¹⁴ See eg Civic Government (Scotland) Act 1982 Schedule 1; Private Rented Housing (Scotland) Act 2011.

¹¹⁵ C Mills, *A review of waste disposal at the Mobuoy site and the lessons learnt for the future regulation of the waste industry in Northern Ireland* (December 2013) available at <http://www.doeni.gov.uk/niea/mills-review-december-2013.pdf> 1.

Van Duyne has questioned the sense of a special policy against corruption by organised crime, on the basis that an anti-corruption policy should have a general impact.¹¹⁶ Similarly, I suggest that while the nature and gravity of corruption by organised crime may be cause for concern, it is not sufficiently distinct as to warrant a new and separate legal scheme. Instead, we must consider the substantive and symbolic value of our existing legal mechanisms, not least in an effort to attain some uniformity across the UK in preventing and reacting to corruption by organised crime.

¹¹⁶ Van Duyne n 47, 224.